

1 Marty Harper (#003416)
2 mharper@polsinelli.com
3 Andrew S. Jacob (#22516)
4 ajacob@polsinelli.com
5 Jennifer Axel (#023883)
6 jaxel@polsinelli.com
7 POLSINELLI PC
8 CityScape
9 One East Washington St., Suite 1200
10 Phoenix, AZ 85004
11 Fax: (602) 264-7033
12 Phone: (602) 650-2000
13 *Attorneys for Plaintiffs*

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17
18 Don Addington; et al.,
19 Plaintiffs,

20 vs.

21 US Airline Pilots Ass'n, et al.,
22 Defendants.

23 No. CV-13-00471-PHX-ROS

24
25 **PLAINTIFFS' TRIAL**
MEMORANDUM ON THE
PARTICIPATION OF WEST PILOTS
IN THE MCCASKILL-BOND
PROCESS

26
27 **MEMORANDUM OF POINTS AND AUTHORITIES**

28 **I. Overview**

29 The McCaskill-Bond amendment to the Federal Aviation Act, 49 U.S.C. § 42112,
30 note, § 117, (copy attached as Exhibit "A")¹ adopts certain seniority merger procedures
31 that were used when the airline industry was regulated by the Civil Aviation Board (the
32 "CAB"). Those procedures gave interested workers the right to participate in seniority
33 merger arbitrations apart from their union representatives. That said, McCaskill-Bond

34
35
36
37
38 ¹ If the Court believes that it needs more authority than just the current Complaint
39 (Doc. 1) to decide the participation issues under McCaskill-Bond, then, with the Court's
40 permission, the West Pilots will quickly file an amended complaint.

1 does not require the West Pilots to arbitrate enforcement of the Nicolau award. That is
 2 because McCaskill-Bond neither supersedes the Transition Agreement nor otherwise
 3 allows USAPA to disregard the Nicolau Award without “show[ing] some objective
 4 justification.” *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976).

5 Regardless, if the West Pilots agree to arbitrate a resolution of the Nicolau Award
 6 dispute, the duty of fair representation (“DFR”) requires that USAPA remain neutral.
 7 That requires a neutral process, akin to: (1) what the CAB required pursuant to the
 8 *Allegheny-Mohawk* Labor Protective Provisions (“LPPs”); (2) what McCaskill-Bond
 9 requires for current mergers; (3) what the Transition Agreement requires here; and (4)
 10 what occurred in the Nicolau arbitration. It also requires neutral definition of, and equal
 11 participation by, the parties in interest. Because USAPA must not take sides, those parties
 12 must be East Pilots and West Pilots, not USAPA.²

13 **II. Legal Argument**

14 **A. McCaskill-Bond does not apply to the 2005 US Airways-America
 15 West merger.**

16 As a preliminary matter, there are three reasons that McCaskill-Bond does not apply
 17 to the 2005 US Airways-America West merger and does not provide a process by which
 18 USAPA can legitimately disregard the Nicolau Award. First, McCaskill-Bond disclaims
 19 applying to airline mergers that occurred prior to December 26, 2007. 49 U.S.C. § 42112,
 20 note, § 117(c) (“This section shall not apply to any covered transaction involving a
 21 covered air carrier that took place before the date of enactment of this Act [Dec. 26,
 22 2007].”). Not only did the US Airways-America West merger occur long before that date,
 23 but by that date Airways had already accepted the Nicolau Award seniority list. (Doc. 14-
 24 1 at App. 130, Doug Parker, Letter to US Airways Pilots (Dec. 20, 2007).)

25
 26 ² This is important because USAPA does not intend to be neutral. *See* Doc. 14-3 at
 27 App. 457, G. Hummel, *President’s Message*, at 2 (Feb. 21, 2013) (stating that USAPA
 28 intends to “begin the seniority integration process with APA by pursuing date-of-hire
 integration of East and West Pilots”).

1 Second, McCaskill-Bond expressly exempts seniority integration of employee
 2 groups that were represented by the same union at the time of the merger. 49 U.S.C.
 3 § 42112, note, § 117(a)(1) (providing that McCaskill-Bond does not apply where “the
 4 same collective bargaining agent represents the combining crafts or classes at each of the
 5 covered air carriers”). At the time of the 2005 US Airways-America West merger, ALPA
 6 represented both East and West Pilots. McCaskill-Bond, therefore, does not apply to
 7 East-West seniority integration.

8 Third, even if McCaskill-Bond did apply to East-West seniority integration (which
 9 it does not), it does not supersede provisions in a CBA (such as the Transition
 10 Agreement) that provide protections equivalent to the LPPs. 49 U.S.C. § 42112, note,
 11 § 117 (a)(2). ALPA Merger Policy, which was incorporated into the Transition
 12 Agreement, provided such protections. *Nat'l Airlines Acquisition, Arbitration Bd.*, 95
 13 C.A.B. 584, 584, 1982 WL 35318, at *1 (C.A.B. Apr. 15, 1982). Consequently,
 14 McCaskill-Bond does not supersede the process, conducted pursuant to the Transition
 15 Agreement, that culminated in the Nicolau Award.

16 **B. Precedent under the CAB.**

17 **1. Under the CAB, employees affected by an airline merge could
 18 demand that seniority lists be integrated by a neutral
 19 arbitrator.**

20 McCaskill-Bond adopts LPP §§ 3 & 13, which controlled seniority integration in
 21 airline mergers when the industry was regulated by the Civil Aeronautics Board (the
 22 “CAB”).³ *See Allegheny-Mohawk*, 59 C.A.B. 19, 45 (1972). The purpose of the LPPs was
 23 to “ward off labor strife that could impede or delay a route transfer or merger, or
 24 detrimentally affect a carrier’s stability or efficiency.” *Braniff Master Exec. Council of*
 25 *the APA v. C.A.B.*, 693 F.2d 220, 223 (D.C. Cir. 1982). That same purpose underlies
 26 McCaskill-Bond.

27
 28 ³ A copy of LPP §§ 3 & 13 is attached as Exhibit “B.”

1 LPP § 3 required that “provisions shall be made for the integration of seniority lists
 2 in a fair and equitable manner.” It also provided, if “employees affected” by a merger
 3 cannot agree on how to merge their seniority lists, that “the dispute may be submitted by
 4 either party for adjustment in accordance with section 13.” And LPP § 13(a) provides that
 5 such adjustment shall be by neutral arbitration.

6 LPP §§ 3 & 13 also provided that the carrier was “responsible for integrating
 7 seniority lists.” *Nat'l Airlines Acquisition*, 95 C.A.B. at 585, 1982 WL 35318, at *1
 8 (emphasis added). As the CAB wrote, “Sections 3 and 13 impose upon the carrier a duty
 9 to integrate seniority listings fairly and equitably and a duty to submit certain disputes
 10 between it and its employees to arbitration.” *Great No. Pilots Ass'n*, 91 C.A.B. 795, 799-
 11 800 (1981) (emphasis added). Consequently, to the extent that McCaskill-Bond applies to
 12 the East-West integration, it puts the onus on US Airways to ensure that the West Pilots
 13 are fairly integrated with the East Pilots.

14 Fair integration under the LPPs allowed all affected employees to participate in the
 15 neutral seniority integration process (either directly or through representatives). LPP
 16 § 13(a), for example, provided that “any party” involved in a merger related seniority
 17 dispute had a right to demand neutral arbitration. Consequently, under CAB regulation,
 18 sub-groups of affected employees had the right to participate in seniority integration
 19 arbitrations. That happened in *Pan Am. World Airways, Inc. v. CAB*, where the CAB
 20 ordered the carrier to arbitrate the seniority claim of a single employee. 683 F.2d 554
 21 (D.C. Cir. 1982). It happened in other matters as well. *E.g., So. Employees. v.*
 22 *Republic/ALEA*, 102 C.A.B. 616 (1983) (employee committee); *Pan Am-TWA Route*
 23 *Exchange, Arbitration Award*, 85 C.A.B. 2537 (1980) (three individual flight engineers).
 24 Indeed, the CAB read the LPPs as allowing it to order arbitration of any dispute that was
 25 “at least arguably” covered. *See Pan Am. World Airways*, 683 F.2d at 560 (approving this
 26 practice).

2. The general policy favoring arbitration supports this Court taking guidance from CAB-era decisions.

Unless Congress clearly states that “court-made law . . . is left undisturbed,” the Supreme Court tells us that “Congress’ silence is just that — silence.” *Community for Creative Non-Violence v. Reid*, 490 US 730, 749 & n.15 (1989). Congress was silent as to whether to import wholesale the decisions reviewing the CAB’s application of the LPPs. Consequently, the fact that McCaskill-Bond adopts LPP §§ 3 & 13 does not mean that Congress intends federal courts to apply the LPPs now exactly as they were applied when the industry was regulated by the CAB. The Court, therefore, cannot use CAB-era decisions as the only basis to order arbitration of all disputes that are at “at least arguably” covered by the LPPs. *See Pan Am. World Airways*, 683 F.2d at 560.

12 But the Court has more than CAB-era decisions. It can rely on the generally strong
13 presumption in favor of arbitration. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d
14 1126, 1131 (9th Cir. 2000) (“[A]s a matter of federal law, any doubts concerning the
15 scope of arbitrable issues should be resolved in favor of arbitration.”). That general
16 policy bolsters CAB-era decisions that favor arbitration and provides the Court solid
17 ground to apply LPP §§ 3 & 13 as they were applied by the CAB.

3. Until the East-West dispute is fully-settled, the West Pilots should participate in all seniority integration procedures.

20 The question of pilot seniority integration from the 2005 US Airways-America
21 West merger was settled by the Nicolau arbitration in 2007. To the extent that USAPA
22 claims it was not, the West Pilots are “employees affected” by the present US Airways-
23 American Airlines merger. Consequently, if McCaskill-Bond applies, the West Pilots
24 have a right to fully participate in each phase of MOU seniority integration beginning
25 with creation of the Seniority Integration Protocol.

26 McCaskill-Bond, however, does not provide a basis to compel the West Pilots to
27 arbitrate because it provides affected workers with a right, but not an obligation, to
28 arbitrate. That said, if another arbitration is the only quick way to resolve the dispute over

1 whether the Nicolau Award should be the seniority order of the US Airways pilots, the
 2 West Pilots will arbitrate that point with the East Pilots under the terms set out in the
 3 concurrently filed *Plts. ' Trial Memo. on Remedy.*

4 **C. If USAPA rejects the Nicolau Award it must provide a neutral
 5 process for determining seniority integration and disclaim any right
 6 to ratify the result.**

7 USAPA must remain neutral when resolving a dispute such as this because it has no
 8 legitimate reason to prefer the position of one pilot group over another. *Cf. Rakestraw*,
 9 981 F.2d at 152 (recognizing as a legitimate reason the goal of discouraging pilots from
 10 crossing future picket lines). Neutrality precludes USAPA, its officers and its attorneys
 11 from playing any role in the substantive determination of pilot seniority integration.
 12 Neither USAPA, nor its officers, nor its attorneys can advocate for the position of one
 13 side or decide the merits of the dispute. USAPA, therefore, must do nothing more than:
 14 (1) defer resolution of the seniority dispute to pilot committees for the East and West
 15 Pilot groups; (2) require (and pay) for these committees to be represented by counsel who
 16 have not represented USAPA;⁴ and (3) pay a neutral arbitrator to determine the seniority
 17 order to be used for the East and West pilots.

18 Seniority arbitration must be “final and binding.” LPP § 13(a). That means it cannot
 19 be rejected by the USAPA Board of Pilot Representatives. It cannot be put to a member
 20 ratification vote. Rather, USAPA must commit to adopt the result of seniority arbitration
 21 without ratification, just as ALPA did in 2005.

22 **III. Conclusion**

23 Under all controlling authority—the LPPs, McCaskill-Bond, and general principles
 24 of fair representation—any determination of the seniority dispute here must be done in a
 25 fair, neutral process. USAPA cannot take sides in that process (as it has heretofore always

26 ⁴ USAPA’s present counsel owes fiduciary duties to the entire craft, both East and
 27 West sides, and breaches that duty by advocating East interests over those of West. There
 28 is no justification for that to continue during arbitration between East and West Pilots.

1 done). Its officers and attorneys must be neutral. There must be full participation by West
2 Pilot representatives. USAPA must fund the West Pilots' efforts the same as it does for
3 the East Pilots.

4 Dated this 17th day of May, 2013.

5 **POLSINELLI PC**

6 */s/ Andrew S. Jacob*

7 By _____

8 Marty Harper

9 Andrew S. Jacob

10 Jennifer Axel

11 *Attorneys for Plaintiffs*

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this 17th day of May 2013, I electronically transmitted the
14 foregoing document to the U.S. District Court Clerk's Office by using the ECF System
15 for filing and transmittal.

16 */s/ Andrew S. Jacob*

17 By _____

18

19

20

21

22

23

24

25

26

27

28